

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

<b>TRACY MCGILL,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. CIV-06-226-M</b>
	)	
<b>STATE OF OKLAHOMA, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**REPORT AND RECOMMENDATION**

Plaintiff, a prisoner appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983, alleging a violation of his constitutional rights. United States District Judge Vicki Miles-LaGrange has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the reasons set forth herein, the undersigned recommends that the complaint be dismissed without prejudice, due to Plaintiff's failure to pay the filing fee.

By order of this Court dated March 7, 2006, Plaintiff was required to pay an initial partial filing fee in the amount of \$3.46 on or before March 27, 2006. Plaintiff was advised that failure to pay the initial partial filing fee or show cause in writing for his failure to do so, could result in dismissal of this action without prejudice to refiling.

A review of the court file reveals that Plaintiff has not paid the initial partial filing fee. However, on March 24, 2006, Plaintiff submitted a letter to the Court indicating that he currently has an application for writ of habeas corpus pending in the District Court of Comanche County, and that he does not want to pay any amount toward a filing fee in this case if the Court intends to dismiss this action because his criminal conviction has not yet been overturned. Plaintiff's desire to avoid dismissal of this action by not paying

the filing fee does not establish cause for his failure to pay the filing fee as ordered on March 7, 2006. Therefore the undersigned recommends that this action be dismissed without prejudice. Local Civil Rule 3.4(b); Lucky v. Hargett, No. 97-6161, 1997 WL 603780 (10<sup>th</sup> Cir. Oct. 1, 1997) (upholding dismissal of Section 1983 claim for failure to pay initial partial filing fee); Amen v. United States, No. 96-5146, 1997 WL 158163 (10<sup>th</sup> Cir. April 1, 1997) (district court should have dismissed the complaint without prejudice when the plaintiff failed to pay the filing fee).<sup>1</sup>

### **RECOMMENDATION**

Accordingly, because Plaintiff has neither paid the partial filing fee as ordered by this court nor shown good cause for such failure, it is recommended that this action be dismissed without prejudice to refiling. Plaintiff is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by May 1, 2006, in accordance with 28 U.S.C. §636 and Local Civil Rule 72.1. Plaintiff is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10<sup>th</sup> Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

**ENTERED** this 10th day of April, 2006.

  
\_\_\_\_\_  
DOYLE W. ARGO  
UNITED STATES MAGISTRATE JUDGE

---

<sup>1</sup> Unpublished dispositions cited as persuasive authority pursuant to Tenth Circuit Rule 36.3